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No. 83-260

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH PETTINEO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Goldberg v. *Weinberger*, 546 F.2d 477 5

INS v. *Hibi*, 414 U.S. 5 5

INS v. *Miranda*, No. 82-29 (Nov. 8, 1982) 4-5

Montana v. *Kennedy*, 366 U.S. 308 5

Schweiker v. *Hansen*, 450 U.S. 785 5

United States v. *Stewart*, 311 U.S. 60 5

Utah Power & Light Co. v. *United States*, 243 U.S. 389 5

Statute:

Internal Revenue Code of 1954, 26 U.S.C. 6672(a) 1

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges a decision holding him personally liable for unpaid FICA and other taxes withheld from his employees. The decision is correct and does not conflict with that of any other circuit. There is no basis for review by this Court.

1. At trial in the United States District Court for the District of New Jersey, the jury determined that petitioner became a "responsible person" of Kanek Tool Corporation on January 15, 1975, and that he willfully failed to pay over to the government $62,027 in taxes withheld from Kanek's employees during the first two quarters of that year (C.A. App. 780a-781a). The district court accordingly entered judgment holding petitioner personally liable for those taxes under Section 6672(a) of the Internal Revenue Code.[1]

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[1]Section 6672(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by * * *[26 U.S.C.] who willfully fails to

Petitioner's motion for a new trial was denied (C.A. App. 7a), and the court of appeals affirmed in a one-sentence judgment order (Pet. App. A1-A2).

2. The pertinent facts may be summarized as follows: In December, 1974, petitioner contacted Frank Paglianite, an attorney, for tax advice about two of petitioner's wholly-owned corporations, Super Quality Oil Company and Custom Oil Company (C.A. App. 362a). Paglianite suggested that petitioner acquire Kanek Tool Corporation, so that its tax losses[2] could be used to offset the income of Super and Custom (C.A. App. 375a, 376a, 378a, 379a). Petitioner was also led to believe that Kanek was a good investment (C.A. App. 376a, 379a). On December 31, 1974, petitioner had Super and Custom issue checks to Paglianite for $50,000 and $8,000 respectively to acquire stock of Kanek (C.A. App. 380a). Although no stock was ever issued, petitioner believed that his companies had purchased a 50% interest in Kanek, and that Paglianite owned the other 50% interest (C.A. App. 377a-378a).

Petitioner was the president and treasurer of Kanek during the first and second quarters of 1975 (C.A. App. 8a-1, 8a-2, 477a, 521a, 522a, 551a, 552a) and made representations as such to others (C.A. App. 523a). He had authority to sign checks for Kanek (C.A. App. 8a-1, 8a-2, 527a, 528a) and did sign checks for it on occasion (C.A. App. 550a, 584a). He helped negotiate loans for Kanek, signed notes on

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collect such tax, or truthfully account for and pay over such tax * * * shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax * * * not accounted for and paid over."

[2]Petitioner was told that Kanek had approximately $450,000 in tax write-offs (C.A. App. 376a). Petitioner later discovered that the tax loss was only $125,000 (C.A. App. 378a).

Kanek's behalf and, on March 3, 1975, personally guaranteed Kanek's obligation to a bank (C.A. App. 429a, 546a, 551a, 552a).

Petitioner, his companies and his relatives also lent substantial sums to Kanek during the first two quarters of 1975 (C.A. App. 297a, 531a). Petitioner became suspicious of Paglianite and recommended that Kanek hire a comptroller (C.A. App. 264a, 423a-424a). The comptroller, who was hired despite Paglianite's opposition (C.A. App. 300a-301a, 423a, 556a), reported to petitioner concerning financial matters and to Paglianite concerning day-to-day problems (C.A. App. 282a). The comptroller believed that petitioner and Paglianite had equal authority in Kanek (C.A. App. 302a, 307a), and the company's bookkeeper testified that both men were her "bosses" (C.A. App. 669a, 678a).

By the end of May, 1975, petitioner believed that he was being defrauded by Paglianite and was aware of Kanek's very poor financial condition (C.A. App. 430a, 554a-555a). He accordingly entered into an agreement with Paglianite whereby petitioner agreed to borrow money for Kanek and Paglianite agreed to surrender his interest in it to petitioner's companies for one year (C.A. App. 430a, 432a, 543a, 545a). Subsequently, after a heated discussion in June, 1975, over a forged mortgage, petitioner ousted Paglianite from the company (C.A. App. 452a-455a).

Petitioner knew that Kanek was required to withhold taxes from its employees' wages and that it was having financial problems (C.A. App. 430a, 509a). He was told of recurring telephone calls from creditors (C.A. App. 267a) and received in late May or early June documents indicating that Kanek's withholding taxes had not been paid for the fourth quarter of 1974 or the first quarter of 1975 (C.A. App. 434a, 439a-440a). Petitioner signed checks (including

payroll checks) in payment of Kanek's creditors during the first two quarters of 1975 and continued to have Kanek pay creditors after he became aware of its financial distress (C.A. App. 530a, 531a, 558a). He failed to correct the mismanagement of Kanek until July, 1975, despite his suspicions of Paglianite in May (C.A. App. 424a, 514a). Petitioner in July signed Kanek's quarterly returns of employment taxes withheld (Form 941) for the first and second quarters of 1975, and continued to pay Kanek's creditors (including employees) even though he knew that the taxes reported as due on those returns had not been paid (C.A. App. 504a, 530a-531a, 558a, 604a-605a).

On these facts, the jury determined that petitioner became a "responsible person" of Kanek on January 15, 1975 (C.A. App. 780a-781a), and that his failure to pay over the taxes was willful as of that date (C.A. App. 781a). Judgment was entered accordingly (C.A. App. 6a).

3. Petitioner does not address the merits of his personal liability for Kanek's unpaid withholding taxes under Section 6672(a), appearing to concede that there was sufficient evidence to support the jury's determination that he was a "responsible person" and that he willfully failed to pay over the money. Rather, petitioner's sole contention (Pet. 2, 11) is that the government is estopped from collecting the taxes from him by the conduct of one Coveney, an alleged government undercover agent. Petitioner's claim of estoppel is based on the assertion (Pet. 11) that the government remained silent even though it knew of the fraud perpetrated on petitioner by Paglianite, and that Coveney "actively concealed the true state of affairs in order to protect his investigation," thus helping to "lure petitioner into Paglianite's trap."

Even if petitioner's assertions were treated as correct, he failed to introduce any evidence of "affirmative misconduct" on the part of the government. See *INS* v. *Miranda*,

No. 82-29 (Nov. 8, 1982) (per curiam); *Schweiker* v. *Hansen*, 450 U.S. 785, 788-789 (1981) (per curiam); *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961). Petitioner did not show that Coveney was placed in Kanek by the government. Even if Coveney were a government informer, there was no proof that he was authorized to make the statements petitioner allegedly relied on, or that his representations could bind the United States in any way. No estoppel could be set up against the government on such facts. *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917). See *Goldberg* v. *Weinberger*, 546 F.2d 477, 480-481 (2d Cir. 1976). In any event, petitioner did not object to the district court's failure to charge the jury on estoppel (C.A. App. 631a, 763a), and it cannot be said that the failure so to charge the jury was plain error. Accordingly, contrary to petitioner's contentions (Pet. 11-12), this case is not an appropriate vehicle for resolving whatever questions may remain after *Hansen* and *Miranda* as to the operation of the doctrine of estoppel against the government.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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